ART-IS AT WORK SDN BHD *a*

v.

SONY MUSIC ENTERTAINMENT (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-823-1998]
23 MARCH 2000

CONTRACT: *Formation - Subject to contract - Whether a legally binding contract - Whether words to the like effect sufficient to constitute non-binding contract - Whether dependant on parties' intention - Whether intention to be determined from documents exchanged - Whether parties intended to be legally bound upon execution of a formal agreement* *c*

CIVIL PROCEDURE: *Appeal - Summary judgment, decision to refuse - Whether there was a triable issue - Whether application for summary judgment rightly dismissed by Senior Assistant Registrar* *d*

The plaintiff appealed against the decision of the Senior Assistant Registrar who had dismissed the plaintiff's application for summary judgment pursuant to O. 14 r. 2(1) of the Rules of the High Court 1980 ('RHC'). The plaintiff's *e* application for summary judgment was confined to the defendant's liability under a "Provisional Distribution Agreement" with damages to be assessed thereafter.

The Provisional Distribution Agreement dated 6 May 1999 was signed between *f* the plaintiff and the defendant wherein the plaintiff granted the defendant, amongst other things, the exclusive right to sell and distribute recordings of its music artist, one Amy, in Malaysia and Brunei. The plaintiff claimed that the defendant was indebted to the plaintiff for damages because of the wrongful repudiation by the defendant of the Provisional Distribution Agreement. The plaintiff argued that the Provisional Distribution Agreement *g* was enforceable and legally binding although the parties had agreed that a formal agreement incorporating the terms and conditions of the said agreement would be signed in due course.

The defendant submitted that with the signing of the Provisional Distribution *h* Agreement the defendant sent a letter ('the side letter') to the plaintiff wherein the defendant enclosed a cheque for RM20,000 being advance payment in pursuance of signing the Provisional Distribution Agreement. In the side letter,

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the defendant stated: (i) that the sum of RM20,000 was advance payment pursuant to the Provisional Distribution Agreement; (ii) that the sum of RM20,000 was to be deducted from the advance royalty upon signing of the formal agreement; and (iii) that the sum of RM20,000 was to be refunded if the formal agreement did not materialise. However, the parties could not come to an agreement regarding the terms to be incorporated into the formal agreement. As such, the defendant had no choice but to terminate further negotiations.

Apart from the above, the defendant claimed that there was a delay on the part of the plaintiff in applying for the summary judgment. Whilst the plaintiff claimed that the delay was due to the plaintiff's solicitors not being able to obtain instructions and necessary documents due to the Hari Raya festive holidays.

Held:

[1] The paramount consideration in interpreting the phrase "subject to contract" and its variants will be to look for the intention of the parties. The court must determine whether the parties have already entered into a legally binding contract where the execution of the written contract is merely a formality or whether the parties intend that their rights and obligations under the contract should be suspended until the formal and legally binding contract is finalised and executed.

[2] It is purely a question of construction whether a particular document constitutes a legally binding or enforceable agreement between the parties. In the present appeal, the side letter indicated that the parties were still in the process of negotiations in regard to the terms and conditions of the proposed formal agreement. The side letter and the Provisional Distribution Agreement must be construed as simultaneous and concurrent documents and these two documents must be read together in order to determine the intention of the parties.

[3] Three crucial terms could be discerned from the side letter which clearly showed that the Provisional Distribution Agreement was not a legally binding contract: (i) that the sum of RM20,000 was intended to be an advance payment on consideration of signing the Provisional Distribution Agreement; (ii) that the sum of RM20,000 was to be deducted from the advance royalty upon signing the formal agreement; and (iii) that it was the intention of the parties that the plaintiff was obliged to refund the sum of RM20,000 to the defendant if the formal agreement did not materialise and applying the case of *Masters & Anor v. Cameron* that sum should be returned to the defendant.

[4] The language employed in the side letter would be no different from a transaction that was "subject to contract". Based in the case of *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon*, there was no necessity to use the phrase "subject to contract" in order to give the same effect.

[5] Even if the Provisional Distribution Agreement constituted an enforceable and binding contract, it had lapsed and had no legal effect because the proposed formal agreement neither materialised nor was it executed by the parties. As such, there were *bona fide* triable issues in the present appeal which meant that it should be dismissed with costs.

[6] The application for summary judgment must be made after an appearance has been entered and it can be made either before or after the delivery of the defence provided that where it is made after the delivery of the defence, the plaintiff explains the delay and the court decides whether to accept that explanation. If the explanation is rejected, an O. 14 application will not be entertained.

[6a] The reasons for the delay on the part of the plaintiff in applying for summary judgment were quite reasonable and acceptable. At any rate, the delay, if any, was inconsequential. Of crucial importance would be the existence of triable issues which barred the plaintiff from proceeding with the summary judgment under O. 14 RHC.

[Appeal dismissed.]

Cases referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 ***(refd)***

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627 ***(refd)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 ***(refd)***

Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd [1969] 2 MLJ 98 ***(refd)***

Crump v. Cavendish 5 Ex D 211 ***(refd)***

Dane v. Mortgage Ins Corpn [1894] 1 QB 54 ***(refd)***

Dummer v. Brown And Another [1953] 1 QB 710 ***(refd)***

Edwards v. Davis 4 TLR 385 ***(refd)***

Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd [1972] 1 MLJ 168 ***(refd)***

Hillas & Co Ltd v. Arcos Ltd [1932] 38 Com Cas 23 ***(refd)***

Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 MLJ 108 ***(refd)***

Krishnamurthy & Anor v. Malayan Finance Corporation Bhd [1986] 2 MLJ 134 ***(refd)***

Les Fils Dreyfus, etc v. Clarke [1958] 1 All ER 459 ***(refd)***

Lim Chia Min v. Cheah Sang Ngeow & Anor [1997] 2 CLJ 337 ***(refd)***

Majlis Islam Negeri Johor v. United Merchant Finance Bhd (MUI Continental Insurance Sdn Bhd, Third Party) [1995] 4 MLJ 482 ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 2 MLJ 183 ***(refd)***
Mary-Ann Arrichiello v. Tanglin Studio Pte Ltd [1981] 2 MLJ 60 ***(refd)***
MBf Finance Bhd v. Hasmat Properties Sdn Bhd & Ors [1990] 1 CLJ 107 ***(refd)***
Nassau Steam Press v. Tyler 70 LT 376 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Ong Chong Soo v. Tan Eng Tai & Anor [1982] 1 MLJ 307 ***(refd)***
Quek Choon Huat v. RM Seow & Anor [1981] 2 MLJ 3 ***(refd)***
Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York [1998] 1 CLJ 424 ***(refd)***
Roberts v. Plant [1895] 1 QB 597 ***(refd)***
Robinson & Co v. Lynes [1894] 2 QB 577 ***(refd)***
Tai Tong Realty Co (Pte) Ltd v. Galstaun & Anor [1973] 2 MLJ 95 ***(refd)***
TPE Enterprise Sdn Bhd v. Chong Sean Yean (f) [1996] 3 AMR 2773 ***(refd)***
Tractors Malaysia Berhad v. Joseph Thambirajah & Anor [1986] 2 CLJ 72 ***(refd)***
United Manufacturers Sdn. Bhd. (In Receivership) v. Guru Timber Sdn Bhd & Anor [1986] 1 MLJ 168 ***(refd)***
United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 ***(refd)***
Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch 284 ***(refd)***
Winn v. Bull [1877] 7 Ch D 29 ***(refd)***
Whymper & Co v. Buckle & Co ILR [1881] 3 All 469 ***(refd)***
Yap Eng Thong & Anor v. Faber Union Ltd [1973] 1 MLJ 191 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 2(1)

For the plaintiff - Chan Siew Cheong; M/s Kumar Jaspal Quah & Aishah
For the defendant - Michael CM Soo (Porres P Royan and Ong Boo Seng with him); M/s Shook Lin & Bok

Reported by Usha Thiagarajah

JUDGMENT

The Facts

This was an appeal by the plaintiff to the judge in chambers in encl. 14 against the decision of the Senior Assistant Registrar ("SAR") dated 26 April 1997 who had dismissed the plaintiff's application in encl. 7 for summary judgment pursuant to O. 14 r. 2(1) of the Rules of the High Court 1980 ("RHC"). To be precise and concise, encl. 7 was an application by the plaintiff for summary judgment against the defendant and according to the plaintiff it was confined to the defendant's liability under the "Provisional Distribution Agreement" with damages to be assessed thereafter.

The "provisional distribution agreement" was dated 6 May 1999 and it was signed between the plaintiff and the defendant. The plaintiff was represented by its director by the name of Roslizah binte Ahmad while the defendant was represented by its managing director by the name of Rick Loh. That "provisional distribution agreement" was worded as follows:

Provisional Distribution Agreement

This Provisional Distribution Agreement is made between Sony Music Entertainment (M) Sdn Bhd (SME) "the distributor" of the first part and Art-Is At Work Sdn Bhd (AA) "the owner" of the second part on its artist Suhaimi Bin A. Rahman, NRIC No. 580728-01-5189 (Amy-"the artist").

The Parties Have Agreed As Follows:

1. The owner grants to the distributor the exclusive right to sell and distribute recordings in the territory.

2. The owner owns or control(s) the recordings and has the right to use the name of the artist whose performances are embodied in the recordings.

3. The owner warrants that the artist is under exclusive recording contract for the term and territory and is free and unencumbered to enter into this agreement.

4. The owner and the artist further warrant that it will not enter into any agreements with any third parties during the term that would conflict with this agreement.

The Salient Terms And Conditions Of The Agreement Are As Follows:

(i) Term	Minimum 5 recordings in 5 years commencing 1st July 1998.
(ii) Territory	Malaysia and Brunei
(iii) Advance royalty upon signing	RM1,000,000.00 (Ringgit Malaysia One Million only).
(iv) Advance royalty per album recorded	RM80,000.00 (Ringgit Malaysia Eighty Thousand only).
(v) Advance royalty for advertising/ promotion per album released	RM70,000.00 (Ringgit Malaysia Seventy Thousand only).
(vi) Advance royalty per album for inventory delivered	RM50,000.00 (Ringgit Malaysia Fifty Thousand only).
(vii) Royalty	MC – RM8.00 per unit sold
	CD – RM21.55 per unit sold

5. This Provisional Agreement is enforceable and legally binding on the parties and their assigns in law and personal representatives. A formal recording agreement incorporating all the terms and conditions will be signed by the parties concerned in due course.

Signed By :

Sgd. (Illegible).	Sgd. (Illegible).
..	...
RICK LOH	Roslizah Binte Ahmad
Sony Music Entertainment (M) Sdn Bhd	Art-Is At Work Sdn Bhd
Date: 6/5/98	Date: 6 May 1998
Witness By:	Witness By:
Sgd. (Illegible).	Sgd. (Illegible).
...	...
Lee Son Chee	Suhaimi Bin A. Rahman
Date: 6/5/98	Date: 6 May 1998

Mr. Chan Siew Cheong, learned counsel for the plaintiff, argued that although the "Provisional Distribution Agreement" was to be construed as enforceable and legally binding, yet the parties agreed that a formal agreement incorporating the terms and conditions of the "Provisional Distribution Agreement" would be signed in due course. Towards this end, it was said that both the parties engaged solicitors to proceed with the drafting of the formal agreement.

Mr. Michael C.M. Soo, learned counsel for the defendant, submitted that simultaneously with the signing of the "Provisional Distribution Agreement", the defendant sent a letter (hereinafter referred to as the "side letter") addressed to the plaintiff enclosing a PBB cheque no: A566327 for RM20,000 being advance payment in pursuance of signing that "Provisional Distribution Agreement". Incidentally, it is germane to mention that neither the statement of claim nor the plaintiff's affidavit in encl. 6 in support of encl. 7 made any reference, direct or indirect, to the side letter. It is also interesting to note that when the defendant's solicitors in their letter dated 12 January 1999 referred to the side letter, the plaintiff's solicitors requested for a copy of that side letter even though the writ had already been filed. The request of the plaintiff's solicitors by letter dated 14 January 1999 was worded as follows:

KUMAR JASPAL QUAH & AISHAH
YOUR REF: MS/15828/98/SME/DA/AIAW/09
OUR REF: AMY/80249/P/C/nrd

14th January 1999

Messrs Shook Lin & Bok
20th Floor, Arab-Malaysian Building BY FAX/POST
55 Jalan Raja Chulan
50200 Kuala Lumpur

Attn: Mr. Michael Soo

Dear Sir

RE: PROPOSED DISTRIBUTION AGREEMENT BETWEEN

SONY MUSIC ENTERTAINMENT (MALAYSIA) SDN BHD AND ART-IS AT WORK SDN BHD AND SUHAIMI BIN A. RAHMAN

We refer to the above and to your letter of 12th January 1999.

We do not want to enter into any debate as to your contrary stand which would be addressed and ventilated at the proper forum.

In the interim, please forward us a copy of the letter of 6th May 1998 as mentioned in your letter.

Thank you.

Yours faithfully 14 JAN 1999
Sgd. (Illegible).

Now, before I proceed any further it would be ideal to reproduce that side letter which was worded as follows :

Sony Music
May 6, 1998

Art-Is At Work Sdn Bhd
Attn: Roslizah Binte Ahmad

Dear Puan Roslizah

ADVANCE PAYMENT

We enclose a PBB cheque no. 566327of RM20,000.00 (Ringgit Malaysia Twenty Thousand), being advance payment on the consideration of signing the Provisional Distribution Agreement.

However, upon signing the Master Agreement we will deduct this advance of RM20,000.00 from the advance royalty.

Should the Master Agreement between Sony and Art-Is At Work Sdn Bhd not materialise, the advance must be refunded to Sony in full.

Yours faithfully	I acknowledge receipt of the above cheque and agree to the conditions set forth.
Sgd. (Illegible). LEE SON CHEE Finance Director	Sgd. (Illegible). Roslizah Binte Ahmad

Sony Music Entertainment (M) Sdn. Bhd (69206-M)

In the preparation of the formal agreement, the parties exchanged drafts. Both the parties' solicitors could not come to an agreement in regard to the terms that needed to be incorporated in the formal agreement. So it was said that in breach of the "Provisional Distribution Agreement", the defendant had through their solicitors Messrs Shook Lin & Bok by letter dated 25 September 1998 wrongfully repudiated the "Provisional Distribution Agreement". The repudiation letter emanating from the defendant's solicitors to the plaintiff's solicitors was worded as follows:

SHOOK LIN & BOK
PEGUAMBELA & PEGUAMCARA
ADVOCATES & SOLICITORS

September 25, 1998

Attn : Mr. P. Valen	FAX & POST
M/S Kumar Jaspal Quah & Aishah 7th Floor, Menara Promet, Jalan Sultan Ismail 50250 Kuala Lumpur	(Fax No. 2411211) **URGENT** ALREADY SENT BY FACSIMILE TRANSMISSION

Dear Sirs,

Re: Proposed Distribution Agreement Between Sony Music Entertainment (Malaysia) Sdn Bhd. and Art-Is At Work Sdn. Bhd. and Suhaimi Bin A. Rahman

We refer to our letter dated 14th September, 1998 and your letter dated 22nd September, 1998.

2. Our clients are not able to accept the amendments proposed by your clients and contained in your letter dated 9th September, 1998.

3. Since the parties have had several negotiations and more than 4 months had elapsed and yet the parties still cannot reach an agreement, our clients have decided to terminate further negotiation.

4. We are instructed to state that your clients' assertion stated in paragraph 2 of your said letter is not correct. With regard to paragraph 4 of the same letter, your Mr. Valen was informed *vide* our letter dated 11th September, 1998 and the subsequent telephone conversations (P.Valen/ Michael Soo) that we were waiting for our clients' instructions on your clients' said proposed amendments.

Yours faithfully,
Sgd. (Illegible).
Michael Soo

Briefly put, the dispute between the parties revolved on one important personality by the name of Suhaimi Bin A. Rahman or better known to the music lovers out there as "Amy". As an artiste, "Amy" has created quite a sensation with his kind of music and basically the "Provisional Distribution Agreement" gave the defendant the exclusive right to sell and distribute musical recordings of "Amy". While the plaintiff retained under that "Provisional Distribution Agreement", the ownership and control of the recordings and had the right to use the name of "Amy" whose performance was to be embodied in the recordings; the plaintiff too warranted that:

(1) "Amy" was under exclusive recording contract with the plaintiff for the duration of the "Provisional Distribution Agreement" and in two countries, namely, Malaysia and Brunei;

(2) the entering into the "Provisional Distribution Agreement" with the defendant was free from any encumbrance whatsoever;

(3) the plaintiff would not enter into any agreement with any third party during the tenure of the "Provisional Distribution Agreement" or even if the plaintiff were to enter into any other agreement with any third party it would not be in conflict with the "Provisional Distribution Agreement".

Negotiations as to the terms of the formal agreement between the solicitors for both parties went full steam ahead and the chronology of events may be itemised as follows:

Relevant Dates	Events
(1) Between 10 June 1998 15 June 1998:	The defendant transmitted a copy of the draft of the proposed formal agreement to the plaintiff and Mr. Puravalen of the plaintiff's solicitors and the plaintiff's representatives met the defendant's representatives to discuss the proposed formal agreement.
(2) Between 8 July 1998 9 July 1998	Mr. Puravalen of the plaintiff's solicitors met Mr. Michael Soo of the defendant's solicitors and they discussed in detail the draft of the proposed formal agreement. In the course of the discussion the plaintiff proposed amendments to be incorporated to the draft of the proposed formal agreement.
(3) 24 July 1998:	Once again the representatives of both parties met and they discussed the draft of the proposed formal agreement.
(4) 28 July 1998:	The representatives of both parties and their solicitors met to discuss the draft of the proposed formal agreement.
(5) Between 29 July 1998 and 31 July 1998:	The plaintiff's solicitors through Mr. Puravalen informed Mr. Michael Soo of the defendant's solicitors that the plaintiff may not wish to proceed with the proposed formal agreement.
(6) 3 August 1998:	There was a change of heart when the plaintiff's representatives informed the defendant's representatives that the plaintiff would sign the proposed formal agreement.
(7) 5 August 1998:	The response from the defendant was encouraging. The defendant's solicitors relayed the message to the plaintiff's solicitors to the effect that the defendant

was willing and agreeable to sign the proposed formal agreement incorporating amendments acceptable to the parties.

(8) 6 August 1998: The atmosphere was conducive. The plaintiff's solicitors requested from the defendant's solicitors a copy of the draft of the proposed formal agreement with amendments.

(9) 7 August 1998: Once again, the defendant's solicitors wrote to the plaintiff's solicitors and requested for amendments proposed by the plaintiff to the proposed formal agreement.

(10) 11 August 1998: The response was positive. The plaintiff's solicitors forwarded their proposed amendments to the proposed formal agreement to the defendant's solicitors.

(11) 13 August 1998: The defendant's solicitors were taking their clients' instructions on the plaintiff's proposed amendments and this was relayed to the plaintiff's solicitors.

(12) 18 August 1998: The matter went on smoothly. The defendant's solicitors forwarded a copy of the amended draft of the proposed formal agreement and guarantee to the plaintiff's solicitors.

(13) 19 August 1998: Amendments to the proposed formal agreement were transmitted by the defendant's solicitors to the plaintiff's solicitors.

(14) 7 September 1998: Further negotiations proceeded. At this point of time the plaintiff's solicitors informed the defendant's solicitors that the plaintiff had further amendments to the draft proposed formal agreement and guarantee.

(15) 9 September 1998	A positive move was made. The plaintiff's solicitors forwarded amendments to the draft proposed formal agreement and guarantee to the defendant's solicitors.
(16) 14 September 1998:	The plaintiff's solicitors sent a letter to the defendant's solicitors requesting for the proposed formal agreement to be finalised.
(17) 25 September 1998:	The end of the road as far as the defendant was concerned. It was at this time that the defendant's solicitors informed the plaintiff's solicitors that the defendant did not agree to the proposed amendments proposed by the plaintiff and had decided to repudiate the "Provisional Distribution Agreement."

As demonstrated, four months of negotiations between the parties were wasted. Notwithstanding the various amendments and re-amendments of the proposed formal agreement that were exchanged between the parties, it was crystal clear that the plaintiff was not keen to sign the formal agreement. The defendant had no choice but "to terminate further negotiation" and for this purpose gave notice by way of a letter dated 25 September 1998 of its decision. Mr. Michael C.M. Soo for the defendant submitted that until the execution of the formal agreement as envisaged in the "Provisional Distribution Agreement" and the side letter, there was no legal and binding enforceable agreement between the parties. Alternatively, it was submitted that even if the "Provisional Distribution Agreement" was binding on the parties, which was not the case here, that "Provisional Distribution Agreement" had lapsed and had no legal or binding force since the proposed formal agreement did not materialise. Consequently, a submission was made by the defendant through Mr. Michael C.M. Soo to the effect that there were triable issues and a good defence on the merits to the plaintiff's claim warranting a dismissal of encl. 14 with costs.

Mr. Chan Siew Cheng for the plaintiff submitted to the contrary and it was his stand that all along the defendant was justly and truly indebted to the plaintiff for damages because of the wrongful repudiation by the defendant of the "Provisional Distribution Agreement". As a result of that repudiation the plaintiff was said to have suffered loss and damages, both general and special. On these premises, the plaintiff prayed for their appeal in encl. 14 to be allowed with costs.

"Subject to contract" or words to the like effect

The "Provisional Distribution Agreement" contained the following constraining words:

> A formal recording agreement incorporating all the terms and conditions will be signed by the parties concerned in due course.

which was re-emphasised in the side letter by the following words:

> Should the Master Agreement (referring to the formal agreement) between Sony and Art-Is At Work Sdn Bhd not materialise, the advance must be refunded to Sony in full.

That would mean that until a formal agreement was drawn up and executed between the parties there would be no binding contract and the sum of RM20,000 must be refunded by the plaintiff to the defendant. The paramount consideration in interpreting the phrase "subject to contract" and its variants would be to look for the intention of the parties. The court must determine whether the parties had already entered into a legally binding contract where the execution of the written contract is merely a formality or whether the parties intended that their rights and obligations under the contract should be suspended until the formal and legally binding contract is finalised and executed.

The phrase "subject to contract" is often equated with the English conveyancing practice because of the application of the Statute of Fraud which specifically requires that a contract for the sale of land to be evidenced in writing (*TPE Enterprise Sdn Bhd v. Chong Sean Yean (f)* [1996] 3 AMR 2773). In Malaysia, oral contracts are enforceable (*TPE Enterprise Sdn Bhd v. Chong Sean Yean (f) (supra))* and it would therefore be ideal that English cases on the interpretation of the phrase "subject to contract" should be read cautiously and they serve as mere guidelines.

The present appeal was not a case of "a mere expression of the desire of the parties as to the manner in which the transactions already agreed to will in fact go through" (per Parker J in *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch 284, 288-299). Was there therefore a concluded contract between the parties as alleged by the plaintiff? That would be the question that has to be determined by this court. At the end of the day, it is a matter of pure construction. All the decided cases are apt to lead to confusion rather than to enlighten us. The cases of *Quek Choon Huat v. RM Seow & Anor* [1981] 2 MLJ 3; *Ong Chong Soo v. Tan Eng Tai & Anor* [1982] 1 MLJ 307; *Yap Eng Thong & Anor v. Faber Union Ltd* [1973] 1 MLJ 191 and *Tai Tong Realty Co. (Pte) Ltd v. Galstaun & Anor* [1973] 2 MLJ 95 tended to take a very strict interpretation of the words "subject to contract" and these cases have

held that on the interpretations of the correspondences between the parties, the intentions of the parties were that legally binding contracts only came into existence upon the executions of formal contracts. But in *Mary-Ann Arrichiello v. Tanglin Studio Pte Ltd* [1981] 2 MLJ 60, the court held that a legally binding contract was in force even though the agreement contained the phrase "subject to contract". Raja Azlan Shah J (as His Majesty then was) in *Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168 after perusing through the letters and the credit card arrangement concluded that there was a legally binding contract even though a formal contract had not been executed as yet. In a commercial transaction situation, the judge will always look at the whole case in perspective bearing in mind, always, the special and familiar usages of the trade. A good example would be the case of *Hillas & Co. Ltd v. Arcos Ltd* [1932] 38 Com Cas 23. That was a case where Hillas agreed to buy from Arcos "22,000 standards of soft wood goods of fair specification over the season 1930." There was a written agreement and that written agreement contained an option to buy 100,000 standards in 1931. That option was quite uncertain as there were no particulars as to the kind or the size of the timber or the manner of shipment. The purchase for the year 1930 went on smoothly but when the buyers wanted to exercise the option to purchase for 1931, the sellers argued that the failure to define those various particulars showed that the clause was not intended to be binding on either party but rather to provide the guideline for future agreement. The House of Lords held that by looking at the previous course of dealings between the parties, the sellers were bound by the written agreement. Lord Tomlin said at p. 29 of the report:

> The problem for a court of construction must always be so to balance matters that, without the violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.

The court in *Whymper & Co. v. Buckle & Co.* ILR [1881] 3 All 469 was of the view that where two parties have come to a final agreement, and the fact that at the time of their entering into that final agreement they had intended to embody the terms of such agreement into a formal document did not make such an agreement less binding on them.

In contrast would be the case of *Winn v. Bull* [1877] 7 Ch D 29. That was the case where the plaintiff agreed, by a written agreement, to let and the defendant agreed to take on lease a house for a certain period of time at a certain rent "subject to the preparation and approval of a formal contract." But no formal or other contract was ever entered between the parties. The court held that there was no final agreement and therefore specific performance could not be enforced against the defendant. Jessel MR had this to say:

> It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail.

In *Quek Choon Huat v. R.M. Seow & Anor (supra)*, the court construed the correspondences between the parties in order to ascertain whether there was a concluded agreement for the sale of the property. In that case, the plaintiffs applied for and obtained an order for specific performance of an agreement alleged to have been entered between the plaintiffs and the defendant whereby the plaintiffs agreed to purchase and the defendant agreed to sell the property known as No: 3 Fernhill Road, Singapore for the sum of $140,000. Chua J at the High Court level construed three letters that passed between the parties dated 6 June 1979, 27 June 1979 and 9 July 1979 and he held that " a contract may be made by letters and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain." In short, Chua J. held that the three letters constituted a binding contract. On appeal by the defendants, the Court of Appeal allowed the appeal and said that the letter dated 9 July 1979 from the appellant's solicitors showed that the appellant had contemplated and intended that the bargain would be struck in the usual manner by the parties signing and exchanging an agreed agreement for sale and purchase prepared by their solicitors.

In *Ong Chong Soo v. Tan Eng Tai & Anor (supra)*, the issue that had to be decided by the court was whether on the proper construction of certain letters exchanged between the solicitors for the parties, there was a contract of sale concluded between the plaintiff as the prospective purchaser and the defendants as the current owners of No: 17 Lakme Street for the sum of $177,000. In dismissing the plaintiff's claim, the court held that the sale and purchase was subject to contract and there was nothing in the exchange of letters between the parties from which it can be said or inferred that there was a change in the intention of either of the parties to create binding legal relations between themselves in any way. The court also held that the exchange of letters between the solicitors was with regard to the negotiations relating to the making of an agreement for the sale and purchase which was to be the contract between the parties.

In *Yap Eng Thong & Anor v. Faber Union Ltd (supra)*, the court had to decide whether there was a binding contract before the signing of an agreement for sale. It was a case where the agreement was subject to the signing of a formal agreement for sale. Briefly, the facts may be stated as follows. The plaintiffs in that case signed an agreement for the purchase of a semi-detached house

to be constructed on a piece of land and paid $500 as option money. It was agreed that within six weeks of the agreement the plaintiffs should sign an agreement of sale with the owners, failing which the owners were to be at liberty to re-sell the property to another buyer and to forfeit the option money. No agreement of sale was signed and the owners then cancelled the sale. The plaintiffs sued the defendants and claimed damages for breach of contract, and argued that there was already a legally binding contract. The court held that the agreement did not create a legally binding contract and dismissed the plaintiff's action.

In *Tai Tong Realty Co. (Pte) Ltd v. Galstaun & Anor* [1973] 2 MLJ 95, Wee Chong Jin CJ (Singapore) had this to say in regard to the sale of a property that was "subject to contract":

> In substance the appellants were given an option by the respondents who owned the property known as No: 27 Tomlinson Road, to purchase that property. The option was given on the 31st July 1972 and was executed in January 1973. It is a written option and the terms are set out in the document at pages 10 to 13 of the record of appeal. Now, the first of the "terms and conditions" is that written document states that "the sale is subject to contract". The expression "subject to contract" is so well known and has acquired so definite a meaning in relation to the sale of land that unless the facts and circumstances are so very strong and exceptional its effect in law is that there is no binding contract of sale but a mere conditional contract of sale, the condition under that expression being that the parties agree to enter into another contract.

All these authorities serve as useful guidelines in adjudicating encl. 14.

The defendant argued that there was no legally binding and enforceable contract between the parties and for this purpose the case of *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 was cited. That was a case where the then Supreme Court had to decide whether a concluded contract had come into existence and Edgar Joseph Jr SCJ (as he then was) writing for the then Supreme Court expounded sound legal principles that will certainly withstand the test of time. This was what his Lordship said as seen from the headnote at p. 754 and p. 755 of the report respectively:

> (1) The existence of an agreement depends upon the intention of the parties, who must be *ad idem*. It may be inferred from the language used, the parties' conduct having regard to the surrounding circumstances and the object of the contract. The court will generally apply an objective or reasonable man test.

(2) Merely because the parties contemplate the preparation of a formal contract, that would not prevent a binding contract from coming into existence before the formal contract is signed. However, when an arrangement is made 'subject to contract' or 'subject to the preparation and approval of a formal contract', it will generally be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged.

(3) Having regard to the fact that the letter did not contain details such as what 'the appropriate indemnity clauses' were, together with its vital qualifying clause, 'subject to the following terms and conditions', the present case fell within the principle in *Crossley v. Maycock* [1874] 43 LJ Ch 379; [1874] LR 18 Eq 180 that if an agreement is made subject to certain conditions, then until those conditions are accepted, there is no enforceable final agreement.

(4) On its true construction, the letter did not constitute a contract binding in law but was only a record of terms which were agreed as a basis for the negotiations of a contract. It was a letter of intent, *ie* an expression in writing of a party's present intention to enter into a contract at a future date.

(5) Since the plaintiff had commenced the preliminary works, with the knowledge but not necessarily the consent of the defendant, the liability of the defendant would be on a quantum meruit basis not exceeding RM300,000 having regard to para (v) of the letter.

Briefly, the facts in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* may be stated as follows. YC Chin Enterprises Sdn Bhd ("YC Chin") had entered into negotiations to construct low-cost houses and shophouses ("project") for the workers of Ayer Hitam Tin Dredging Malaysia Bhd ("Ayer Hitam"). On 19 September 1984, Ayer Hitam wrote a letter to YC Chin and accepted the latter's proposal in regard to the project, subject to certain terms and conditions, one of which was that the terms and conditions in the letter were to be included in the agreement between YC Chin and Ayer Hitam and that appropriate indemnity clauses in favour of Ayer Hitam be incorporated in the agreement. Acting upon that letter, YC Chin proceeded to perform some of their obligations stated therein, although no formal agreement in writing had been executed. Later, Air Hitam instructed YC Chin to cease all work, and stated their intention to discontinue negotiations and added that any work done was so done at YC Chin's risk. Air Hitam argued that the work had been done before the coming into being of any contract and that the letter was part and parcel of ongoing negotiations for a future agreement. YC Chin argued to the contrary and submitted that all essential terms had been agreed and that all that remained to be done was to put the terms into the form of a contract. The trial judge found that there was a contract and allowed YC Chin's claim for breach. Being aggrieved, Air Hitam appealed.

In allowing the appeal, the then Supreme Court considered the primary issue of whether there was a concluded contract between Air Hitam as the employer and YC Chin as the contractor. Edgar Joseph Jr SCJ (as his Lordship then was), in determining the intention of the parties aptly said at p. 764 of the report:

> But, bearing in mind the familiar saying that a person's beliefs or his state of mind are just as much facts as the state of his disgestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.
>
> In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.
>
> As clear and helpful an enunciation of the principles as any which should guide the court in determining the ever-recurring question of whether there has been a contract between the parties is provided by Saville J in *Vitol BV v. Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep 574 at p 576 in the following words:
>
> > The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them – and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.
>
> In the first place, we should like to make the observation that one would expect that a contract of this nature and magnitude involving as it does a very substantial financial commitment, to wit, RM14m, would be properly documented.

His Lordship continued at p. 766 of the report in these words:

> In the event, pursuant to the qualifying clause in the letter, the so-called deposit fell to be refunded to the purchaser as no sale and purchase agreement was ever signed. In such a situation, the High Court of Australia in *Masters & Anor v. Cameron* (1954) 91 CLR 353 – an authority uncovered in the final stages of the preparation of this judgment – we would interpolate, said this:
>
> > … From the fact that a so-called deposit was paid upon the signing of a document which left each party free to decide against entering into binding contract the *prima facie* inference is that the intention was to provide a sum which should take on the character of a deposit upon the making of a contract, but in the meantime should not become the property of the intending vendor.

Speaking for the Federal Court, Gopal Sri Ram JCA in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 at p. 632; [1996] 3 MLJ 327 said at p. 334 to p. 335 of the report:

> Although the judgment of Edgar Joseph Jr SCJ in Ayer Hitam contains all the learning upon the subject, we would, for completeness, refer to the following passage in the joint judgment of Dixon CJ, McTiernan and Kitto JJ, in *Masters v. Cameron* [1954] 91 CLR 353:
>
> > Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
>
> > In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.

> Meaning no disrespect to counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

and it seems to be that the case of *Masters & Anor v. Cameron (supra)* was used as a spring board to decide the intention of the parties. It is purely a question of construction whether a particular document constitutes a legally binding or enforceable agreement between the parties. In the present appeal before me, the presence of the side letter adds a new complexion and it indicates that the parties were still in the process of negotiations in regard to the terms and conditions of the proposed formal agreement. In my judgment, the side letter and the "Provisional Distribution Agreement" must be construed as simultaneous and concurrent documents and these two documents must be read together in order to determine the intention of the parties.

Three crucial terms can be discerned from the side letter and these terms clearly showed beyond per adventure that the "Provisional Distribution Agreement" was not a legally binding contract:

(1) the sum of RM20,000 was intended to be an advance payment on consideration of signing the "Provisional Distribution Agreement";

(2) the sum of RM20,000.00 was to be deducted from the advance royalty upon signing the "Master Agreement" – or what can be termed as the formal agreement; and

(3) it was the intention of the parties that the plaintiff was obliged to refund the sum of RM20,000 to the defendant if the "Master Agreement" did not materialise and applying the case of *Masters & Anor v. Cameron (supra)* that sum should be refunded to the defendant.

It can be surmised from the available evidence that a formal agreement containing all the terms and conditions to be agreed upon by the parties have not come into existence and the parties were still negotiating on the terms and conditions to be included in the proposed formal agreement.

It is germane to highlight the following points. The plaintiff did not deny the existence of the side letter nor the effects of the side letter notwithstanding the fact that it had filed three affidavits. The side letter as I said earlier was brought to the attention of the plaintiff's solicitors' knowledge on 12 January 1999, a date after the writ and the statement of claim were filed but before

the filing of the O. 14 application. As alluded to earlier there was no mention nor reference at all to the side letter in the statement of claim or in the affidavit in encl. 6. It would therefore be appropriate to say that when the plaintiff filed encl. 7 for an O. 14 application there was suppression or non disclosure of the existence of the side letter.

Of significance would be the language that was employed in the side letter. The language as employed would be no different from a transaction that was "subject to contract". Indeed in the case of *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 MLJ 108 SC, Peh Swee Chin SCJ said that there was no necessity to use the phrase "subject to contract" in order to give the same effect. In that case, the proviso to the letter contained the following words :

> … that the sale and purchase agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989 …

and his Lordship had this to say at p. 116 of the report:

> Against such background of surrounding circumstances, the said document would have to be considered and construed for its proper meaning and effect, the most important aspect being the proper interpretation of the said document itself. In this connection, a comparison of decided cases will usually yield certain principles sometimes, but often it will not be very helpful and is even apt to lead to confusion
>
> Looking at the said document, one was struck immediately by a proviso contained therein, a proviso very similar to the phrase or formula of 'subject to contract' which conveyancing lawyers are prone to employ. There need not be the very words of the said formula in order to have the usual effect arising from the use of such formula; similar phrase or words would achieve the same result, as shown in numerous past cases. Just to quote one example, in *Winn v. Bull* [1877] 7 Ch D 29, the words used were: 'subject to the preparation and approval of a formal contract'; they were treated as having the same effect as if the formula of 'subject to contract' were used."

Further down the same page of the same judgment and spilling to p. 117 thereof, his Lordship continued in serious vein:

> It is settled that the formula of 'subject to contract' gives rise to a strong presumption of the necessity of a further formal contract, 'formal' be it noted, is not to be understood in the common parlance as being just a 'mere formality' of no importance. As Sir Garfield Barwick who delivered the opinion in *Daiman* [1981] 1 MLJ 56 said (at p 58): 'But, in general, employment of the formula 'subject to contract' as a condition of their arrangement will preclude the present assumption by the parties of contractual obligations'. We did not think it necessary to set out here a great number of past cases to illustrate

> such similar effect, and we think that just mentioning one of the more recent cases in addition to the case of *Winn v. Bull* [1877] 7 Ch D 29, will suffice; that extra case is *Derby & Co Ltd v. ITC Pension Trust Ltd & Anor* [1977] 2 890. From the host of such past cases, the principle is clear, it requires cogent evidence to displace this strong presumption. This court enquired: Was there such cogent evidence?

To round it up, this was what his Lordship said (see p. 117 to p. 118 of the report):

> We were of the view that there was no contract at all, because we found that the said document was dependent on the signing of a formal contract to be further negotiated and approved by both parties. On this ground alone, we would allow the appeal.

The Federal Court in the case of *Lim Chia Min v. Cheah Sang Ngeow & Anor* [1997] 2 CLJ 337; [1997] 1 MLJ 127 had to construe a letter written by the defendant to the plaintiff to determine whether there was a concluded contract between the parties. The court had to consider a particular clause in the agreement which was worded thus:

> It is proposed that a formal agreement will be executed between us within four weeks from the date hereof. Should this agreement not be finalized by 23 October 1990, the sum of RM5,000 shall be forfeited by you.

and the Federal Court was of the view that it was quite absurd to construe the existence of a formal agreement on the basis of that clause. The Federal Court further held that to constitute a concluded contract, a formal contract had to be executed again four weeks from the date of the letter. Mohd Dzaiddin FCJ delivering the judgment of the Federal Court had this to say at p. 134 of the report:

> In our view, when parties 'proposed that a formal agreement would be prepared and executed', they must mean what they say. In the instant case, para. 2 clearly provides that a formal agreement will be executed within four weeks from the date of AB1 and should the formal agreement not be finalized by 23 October 1990, the sum of RM5,000 would be forfeited to the vendors. It is quite absurd to construe AB1 as a formal agreement which would mean that under para. 2, it has to be executed again within four weeks from the date in AB1. The events which followed after the first plaintiff received AB1 and the cheque of RM5,000 from the defendant seem to us to be consistent with the intention of the parties. First, the instruction to the solicitors to prepare the formal sale and purchase agreements, AB3-12 and AB14-31, which contained elaborate terms and conditions of the sale. This was followed by the execution of the said agreements by both plaintiffs at the solicitors' office on 22 October

> 1990, and the receipt of two cheques for a total sum of RM485,000. It should be remembered that under para. 2 of AB1 the formal agreement must be finalized by 23 October 1990, otherwise the sum of RM5,000 would be forfeited by the plaintiffs. From the evidence, it is clear to us that the terms in AB1 were never performed and the parties proceeded to complete the sale on the bases of the terms and conditions of the formal agreements AB3-12 and AB14-31.

Finally, at p. 135 of the report his Lordship concluded as follows:

> Having regard to what we have stated above, our answer to the primary issue in this appeal is that, on its true construction, in particular para. 2 thereof, AB1 does not constitute a legally binding contract between the parties, but merely a letter written by the defendant to the plaintiffs expressing a willingness to purchase the latter's businesses and a basis for, and subject to, the preparation and execution of a formal agreement containing elaborate terms and conditions.
>
> Our answer to the above primary question of law is sufficient to dispose of this appeal.

For the reasons adumbrated above, it was my judgment that the "Provisional Distribution Agreement" entered into between the plaintiff and the defendant did not constitute a legally binding contract. It was not a contract that can be enforced in any court of law. Alternatively, even if the "Provisional Distribution Agreement" constituted an enforceable and binding contract, which was not the case here, it had lapsed and had no legal effect because the proposed formal agreement did not materialise nor executed by the parties. These were my judgments and I so hold accordingly. Bereft of a valid and enforceable contract, the application in encl. 7 for summary judgment should not succeed at all. It was doomed to fail right from the very beginning. There were *bona fide* triable issues in the present appeal. This meant that the appeal in encl. 14 should be dismissed with costs.

Lest I be accused of an oversight, I will now consider the issue of a summary judgment.

Summary Judgment Under O. 14 Of The RHC

Hashim Yeop A. Sani SCJ in *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 at page 185 in fine language explained the true meaning behind O. 14 in these words:

> The underlying philosophy in the Order 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to

> judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in a very clear case.

and it was cited with approval by Gopal Sri Ram JCA in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 MLJ 281 CA and there his Lordship said at p. 287 to p. 288 of the report:

> The effect of Order 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no *bona fide* triable isssue.

The plaintiff grounded their application in encl. 7 under O. 14 r. 2(1) of the RHC which is worded as follows:

> An application under rule 1 must be made by summons supported by an affidavit in Form 18 verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.

and clearly therefore the affidavit in support as seen in enclosure 6 must fulfil the twin requirements of:

(1) verifying the facts on which the claim or part of the claim in which the application relates is based: and

(2) stating the deponent's belief that there is no defence to the plaintiff's claim or part thereof, or no defence except as to the amount of damages claim.

and at the end of the day, this court must look at the affidavit in encl. 6 and decide accordingly (*Les Fils Dreyfus, etc v. Clarke* [1958] 1 WLR 300 CA; [1958] 1 All ER 459) and any defect in encl. 6 can certainly be supplemented by filing an additional affidavit.

The purpose of O. 14 is to put an end to a trial and to enable a plaintiff to obtain summary judgment forthwith. It is a procedure where the plaintiff can secure judgment without a trial provided he can prove his claim clearly and the defendant is unable to set up a *bona fide* defence or the defendant could not raise an issue against the claim which ought to be tried (*Roberts v. Plant* [1895] 1 QB 597; *Robinson & Co. v. Lynes* [1894] 2 QB 577; *Dane v. Mortgage Ins. Corpn* [1894] 1 QB 54 CA; *Nassau Steam Press v. Tyler* 70 LT 376; and *Edwards v. Davis* 4 TLR 385 CA). Clearly therefore from the available evidence, the plaintiff failed to satisfy this court that summary judgment should be granted in their favour. It was not a simple and straight forward case. The defendant, on the other hand, succeeded by affidavit evidence in showing to this court that there was indeed a *bona fide* defence

which ought to be tried. That the "Provisional Distribution Agreement" when read with the side letter showed that there was a need to enter into a formal agreement was indicative of a triable issue which ought to be tried in open court. The defendant must in the words of Bramwell LJ in *Crump v. Cavendish* 5 Ex D. 211, C.A. "show that he has some reasonable ground of defence to the action." The defendant in the present appeal has succeeded in doing just that. Summary judgment should not be granted in favour of the plaintiff.

Delay

An argument was advanced by the defendant to the effect that there was a delay on the part of the plaintiff in applying for summary judgment. The plaintiff averred in its affidavit in encl. 6 that the delay was due to the plaintiff's solicitors not being able to obtain instructions and to obtain the necessary documents due to the Hari Raya holidays. The plaintiff too averred that the delay did not prejudice the defendant in any way whatsoever. In rebuttal, by way of an affidavit in encl. 8 at para. 19 the defendant averred through Rick Loh as follows:

> With reference to paragraph 11 of the plaintiff's first affidavit, I note that except for the Provisional Distribution Agreement, all the other exhibits are letters passing between the respective solicitors which would have been in the possession of the plaintiff's solicitors. I note that the Memorandum of Appearance was filed on 15.1.1999 and that Hari Raya Puasa holidays was on 19.1.1999 and 20.1.1999. I do not believe that the explanation for the delay in paragraph 12 (it should be paragraph 11 of enclosure 6) is credible or tenable.

It was the stand of the defendant that the explanation given for the delay was not credible nor tenable for the following reasons:

(1) Except for the "Provisional Distribution Agreement", all the other exhibits were letters exchanged between the parties' solicitors and these letters were in the possession of the plaintiff's solicitors; and

(2) The writ and the statement of claim were filed on 21 December 1998 (see encl. 1). The memorandum of appearance was filed on 15 January 1999 (see encl. 3) and the Hari Raya Puasa Holidays were on 19 January 1999 and 20 January 1999 respectively (see para. 19 of encl. 8). The statement of defence and the counterclaim in encl. 2 were filed on 27 January 1999. The reply to defence and defence to counterclaim in encl. 5 were filed on 9 February 1999. The summons in chambers in encl. 7 for summary judgment was filed on 8 February 1999.

Calculation wise, the delay would be in this order. If calculated from the time the memorandum of appearance was filed to the time when the summons in chambers was filed, the delay came up to 24 days. If calculated from the time when the statement of defence and counterclaim were filed to the time when the summons in chambers was filed, the delay came to 12 days. But when computed from the time the summons in chambers was filed to the time the statement of claim was filed, the delay, calculated backwards, was longer – to be exact, 1 month and 17 days.

As the law now stands, an application under O. 14 must be made after an appearance has been entered and the application could be filed before or after the delivery of the defence but when the application is made after the defence has been delivered the delay must be accounted for and acceptable to the court. In *Krishnamurthy & Anor v. Malayan Finance Corporation Bhd* [1986] 2 MLJ 134 SC, Salleh Abas LP at p. 135 of the report distilled the law in this fashion:

> In the second place the law as to the time when an application for an Order 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no Order 14 judgment could be signed. This is the *ratio decidendi* in *McLardy v. Slateum* [1890] 24 Q.B.D. 504. This case was followed by Raja Azlan Shah, J. (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd* [1969] 2 M.L.J. 98 and Abdoolcader, J. (as he then was) in *Societe des Etains de Bayas Tudjuh v. Who Heng Mining Kongsi* [1978] 2 M.L.J. 267.

Now, the summons in chambers in the present appeal was filed after the filing of the statement of defence and counterclaim and there was no evidence as to when the defence was delivered. Be that as it may, the delay must be explained. An explanation was advanced for that delay and it was now up to me to decide whether to accept that explanation.

In regard to the delay in *Krishnamurthy & Anor v. Malayan Finance Corporation Bhd (supra)*, Salleh Abas LP at p. 135 of the report had this to say:

> We do not think that the delay in this case is such as to inhibit the court from granting the respondents' application for an Order 14 judgment.

Abdul Malek Ahmad J (now FCJ) in *MBf Finance Bhd v. Hasmat Properties Sdn Bhd & Ors* [1990] 1 CLJ 107 at p. 108; [1990] 1 MLJ 180 dealt with the issue of delay in this manner (see p. 181 of the report):

> To my mind, the question of inordinate delay for an O 14 application lies at the discretion of the trial judge having considered the explanation given by the plaintiff for the lapse of time taken after the writ or the statement of defence was filed. In *Comptroller General of Inland Revenue Malaysia v. Weng Lok Mining Co Ltd* [1969] 2 MLJ 98, for instance, the court was of the opinion that a three-month delay was not inordinate after accepting the reasons given by the plaintiff. Again, in *McLardy v. Slateum* [1890] 24 QBD 504, which was decided about 100 years ago, a one-month delay was found to be reasonable and no explanation was needed for the delay. In the circumstances, I was of the view that the five months and 21 days' lapse was not inordinate in this case, especially so when after the grace period to settle, the time lapse was actually only four months and six days.

In *United Manufacturers Sdn. Bhd. (In Receivership) v. Guru Timber Sdn. Bhd. & Anor* [1986] 1 MLJ 168, the court was satisfied that the delay in taking out the application had been adequately explained. The explanations were that the plaintiffs were under receivership and the staff had been reduced from 320 to only 32. George J explained the law in these words (see p. 169 to p. 170 of the report):

> The judgment that is perhaps most often cited when the question of delay in applications for summary judgment comes up is that of Raja Azlan Shah J. (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd.* [1969] 2 M.L.J. 98. Since 1978 the judgment of Abdoolcader J. (as he then was) in *Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 M.L.J. 267 is also invariably cited. Each of those judgments relied on *McLardy v. Slateum* (1890) 24 Q.B.D. 504, a judgment of the English Divisional Court which held that although it was the intention of the Rules that the application for summary judgment should be made before a defence had been delivered in ordinary course, the plaintiff was not precluded from making it afterwards, but in such an event the onus is cast on the plaintiff of showing why he did not apply sooner.

In *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd* [1969] 2 MLJ 98, the reasons for the delay were listed as (see p. 99 of the report):

> … that the Department of Inland Revenue is a very large department, heavily loaded with work and shorthanded; and the situation was aggravated by the intervening Puasa hours, court vacation and festivities, namely Hari Raya Puasa, Christmas and the New Year holidays.

and Raja Azlan Shah J (as His Majesty then was) accepted the "delay of a lapse of 3 months in the circumstances of the case" as not inordinate. His Majesty narrated the facts and set out the law as follows:

The plaintiff claimed, by way of a specially endorsed writ of summons, a sum of $85,150.74 being the alleged amount of income tax and penalty due and payable by the defendant company under section 86(1) of the Income Tax Ordinance, 1947. The writ was issued on 4th October, 1968 and an appearance was entered on the 15th October and subsequently a defence was filed on 31st October, 1968. The plaintiff took no further steps until 31st January, 1969 when he filed an application for summary judgment under Order 14 by way of summons in chambers. Thereupon the defendant company sought to set aside the summons on the ground that undue delay on the part of the plaintiff would disentitle him to summary judgment. Counsel for the defendant company cited the case of *McLardy v. Slateum* [1890] 24 Q.B.D. 504 in support of his contention. In that case an application for summary judgment was successfully made one month after a defence was filed. The position is clearly stated by Pollock B, at page 506:

> The view taken by other judges, and by the masters, is that the intention of O. 14 r. 1 was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under Order 14 right and proper. We think that this is the proper construction of the rule ... Although the primary intention of the rule may be that an application should be made before defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory. Therefore our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under Order 14, r. 1 because a defence has been delivered... If a plaintiff makes his application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case.

In *Tractors Malaysia Berhad v. Joseph Thambirajah & Anor* [1986] 2 CLJ 72, the delay in filing the summary judgment application came to nearly two years after filing of the writ and almost one year after the defence of the first defendant was filed. Zakaria Yatim J (as he then was) said that the court has the power to enter summary judgment even though the defence had been filed and the plaintiff took some time to file the application.

In *Majlis Islam Negeri Johor v. United Merchant Finance Bhd (MUI Continental Insurance Sdn Bhd, Third Party)* [1995] 4 MLJ 482, the delay came up to 23 days and I had this to say (see p. 486 of the report):

> Order 14 of the RHC is silent as to the consequences of delay in filing the summary judgment and, in my judgment, the failure to explain the delay will not be construed unfavorably against the plaintiff. In *Tractors Malaysia Bhd v. Joseph Thambirajah & Anor* [1986] 2 CLJ 72 where there was a delay of

> one year to file an O. 14 application and though such delay was not accounted for, yet the court there condoned the delay. I too would condone the plaintiff's delay and more so as the time span is shorter.

It is appropriate to mention that the Federal Court has since confirmed the decision of *Majlis Islam Negeri Johor v. United Merchant Finance Bhd (MUI Continental Insurance Sdn Bhd, Third Party) (supra)* as reflected in the case of *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151.

In *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1998] 1 CLJ 424 at p. 429; [1997] 3 MLJ 818 CA, Gopal Sri Ram JCA said at p. 821 of the report:

> When properly understood, there is nothing in *Ng Hee Thoong*'s case to suggest that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court. Such a proposition runs counter to the interests of justice. For delay can surely provide no answer to an application made under O. 14 where there are no *bona fide* triable issues. We therefore take this opportunity to declare the absence of the proposition contended for by counsel.

and NH Chan JCA delivering a separate judgment, concurred with this proposition and added at p. 822 of the report:

> Delay in applying for O. 14 is no ground for defeating the plaintiff's right to summary judgment under O. 14 when there is no real defence disclosed.

To counter an O. 14 application, the defendant needs only to show a triable issue: *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 MLJ 400 SC especially at p. 408 F-G.

The applicability of an O. 14 application was also set out in the case of *Dummer v. Brown And Another* [1953] 1 QB 710, and at p. 720 to p. 721 of the report, Jenkins LJ had this to say:

> Looking at the substance of the matter, it seems to me to be reasonably plain that in truth there is in this case no defence on the issue of liability, and if there is no defence, then it seems to me eminently desirable that costs should be saved by going straight to the issue of the quantum of damage.

The sum total of all these authorities may be summarised as follows:

(1) Delay, per se, can never be a ground to defeat the plaintiff's right to summary judgment.

(2) If there is no real defence disclosed then the plaintiff would be entitled to obtain summary judgment.

(3) The application for summary judgment must be made after an appearance has been entered and it could be made either before or after the delivery of the defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay and the court must decide whether to accept that explanation. If the explanation is rejected, an O. 14 application would not be entertained.

(4) If there is a triable issue, summary judgment would be refused forthwith.

(5) If the defendant has a good defence on the merits, O. 14 would be refused.

In my judgment, the reasons for the delay were quite reasonable and acceptable. As an artist, "Amy" must be busy during the Hari Raya holidays – entertaining guests and be entertained. At any rate, the delay, if any, was inconsequential. Of crucial importance would be the existence of triable issues which would really bar the plaintiff from proceeding with the summary judgment under O. 14 of the RHC. In the present appeal, there were triable issues which would certainly put encl. 7 into oblivion. I ruled and it was my judgment that encl. 14 should be dismissed with costs. The defendant had a good defence on the merits to counter the plaintiff's alleged claim.